

ORIGINAL

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

KENNETH M. SMITH,
PETITIONER,

THOMAS L. CARROLL, ET AL.,
RESPONDENTS.

C.A. No. 05-262-SLR



PETITIONER'S REPLY BRIEF

Comes the petitioner KENNETH M. SMITH, pro se, pursuant to Rule 2 of the Rules Governing §2254 Actions, 28 U.S.C. tit. §2254, states the following in response to the respondents answer to his writ for habeas corpus relief.

1. The petitioner adopts the respondents account of the Nature and Stage of events.

2. The petitioners claims for relief, albeit, are subject to the Court's review under statutory and equitable tolling procedures. This Court holds the jurisdiction to consider those claims, withstanding any procedure default, where when doing will resolve and relieve a petitioner of an conviction that has resulted in one that is actually innocent. MURRAY V. CARRIER, 477 U.S. at 496 (1986).

3. The petitioner in this instant case not only contends that such is his case.

4. But, moreover is reviewable on its merits through the demonstration of cause this case presents, and the fundamental miscarriage of justice through the respondents misapplication of state law.

4. Contrary to the respondents contention, the interpretation of Walton erodes the construction of the primary element of "display" in First Degree Robbery from that previously held by Smallwood, 346 A.2d 164, 166 (Del. 1975).

5. Despite the respondents reliance on Flore v. White, 231 U.S. at 228 (2001) (A federal court must accept the state court's own determination of the application of precedent versus new law issue). Is a departure from their agreement in all state court proceedings.

6. In Smith v. State, 2004 WL 1221313 (Del. Super.) the Delaware Superior Court held that the amended § 832(a)(2) acted solely as the "white out" applied to the prior version of § 832(a)(2), as modified by Walton, to alleviate any misinterpretation attributable to Walton decision.

7. Under this same interpretation the Court gave relief to Word, 801 A.2d 927 (Del. Supr. 2002), and McKamey, 692 A.2d ____ (Del. Super. 2003), because the state failed to demonstrate "display" under First Degree Robbery.

8. Simply put, because the petitioner has not requested relief as that of Word or McKamey, the respondents has chose to deny him the relief due to him, pursuant to the ex post facto clause. Certainly, by the respondents application of Walton to Word and McKamey was aggregated to events before its enactment. Cal. Dept of Correction v. Morales, 514 U.S. 499, 510 (1995).

9. The petitioner here must be allowed to benefit from the same application of law. Weaver v. Graham, 420 U.S. 24, 29 (1981).

Wherefore, over the objections of the respondents. The petitioner prays this Honorable Court to consider those claims presented in his application for habeas corpus relief under the "contrary to" clause. Matteo v. Superintendent, SC 1 Albion, 121 F.3d at 888 (3rd Cir. 1999). Thus, pursuant to 28 U.S.C. § 2254(d)(1), this petitioner asserts that the state court's decisions were (A) contrary to clearly established federal law precedence, and (B) involved unreasonable application of state law precedence. Williams v. Taylor, 529 U.S. 362, 412, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000).

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Dated: Aug 12, 2005

Certificate of Service

The petitioner declares under penalty of perjury that he has caused true copies of this Reply to the Respondents Answer, through depositing in the U.S. Mail for delivery upon the following:

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